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active application in the absence of a statement to the contrary. 381 U.S. at 628 n. 13. The cases most often cited for the proposition that this Court's decisions in the area of criminal constitutional law should not be given full retroactive effect—*Linkletter v. Walker, supra; Johnson v. New Jersey*, 384 U.S. 719 (1966); *Tehan v. Shott*, 382 U.S. 406 (1966); and *Stovall v. Denno*, 388 U.S. 293 (1967)—resolved the question of the retroactivity of prior decisions where the issue had been left open in the substantive case. The cases to which they respectively applied—*Mapp v. Ohio*, 367 U.S. 643 (1961); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Griffin v. California*, 380 U.S. 609 (1965); and *United States v. Wade*, 388 U.S. 218 (1967)—all involved direct appeals rather than petitions for a writ of habeas corpus, so that the issue of retroactivity was not part of those original decisions. *O'Callahan v. Parker*, by contrast, necessarily resolved the issue because it was applied to a final judgment.

Moreover, this Court has not hesitated in the past to order the full retroactive application of decisions limiting the jurisdiction of courts-martial. *Kinsella v. Krueger*, 354 U.S. 1 (1957), involved the court-martial conviction of the wife of an Army colonel for a 1952 murder. Her military appeal became final on December 30, 1954. See *United States v. Kinsella*, 137 F.Supp. 806 (1956). Yet this Court applied its decision in *Toth v. Quarles*, 350 U.S. 11 (1955) retroactively and permitted a writ of habeas corpus to issue. See also *Grisham v. Hagan*, 361 U.S. 278 (1960).

In *Duncan v. Louisiana*, 391 U.S. 145 (1968), this Court held that the states cannot deny a request for a jury trial in serious criminal cases. See also, *Bloom v. Illinois*, 391 U.S. 194 (1968). It is true that this Court subsequently held that the *Duncan* case should receive only prospective application. *De Stefano v. Woods*, 392 U.S. 631 (1968). However, this Court's holding in *De Stefano* should not be determinative of the question here involved. It is well established that the retroactivity or nonretroactivity of a decision does not depend upon the constitutional provision

upon which the decision is based. *Desist v. United States*, 394 U.S. 244 (1969); *United States v. Miller*, 406 F.2d 1100 (4th Cir. 1969). To the contrary, the choice between retroactivity and nonretroactivity must be determined in each case by looking to the peculiarities of the rule set forth in the substantive decision. *Johnson v. New Jersey*, *supra*. A reading of this Court's majority opinion in *O'Callahan* clearly indicates that while the right to trial by jury and the right to indictment by grand jury were the constitutional stakes in question, much more than those constitutional stakes was involved. *O'Callahan* involved not only the denial of those specific constitutional rights but also the subjection of an individual to military law, a body of law which "has always been and continues to be primarily an instrument of discipline, not justice." *O'Callahan v. Parker*, 395 U.S. at 266. Furthermore, in *De Stefano* this Court held that it would not reverse state convictions for failure to grant jury trials where trials began prior to the date of its decision in *Duncan v. Louisiana*, *supra*. Had this Court's decision in *O'Callahan* rested exclusively on the denial of O'Callahan's right to indictment by grand jury and trial by jury in civilian courts, it follows that this Court would not have granted O'Callahan the relief he requested because his court-martial trial had begun many years prior to the *Duncan* decision.

In terms of the three-pronged test for retroactivity laid down in *Linkletter v. Walker*, *supra*, and *Stovall v. Denno*, *supra*, *O'Callahan* is precisely the kind of case which must be given retroactive application. *Linkletter* and *Stovall* held that a decision as to the retroactivity of a particular case depends upon: (1) the purpose to be served by the new standards; (2) the extent of the reliance by law enforcement authorities on the old standards; and (3) the effect on the administration of justice of a retroactive application of the new standards. Within the context of these criteria, this Court has often said that the crucial question is to what extent the proscribed practice has infected the integrity of the fact-finding process. See, *e.g.*, *Stovall v. Denno*,

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Comment, *O'Callahan* v. *Parker: Sounding the Death Knell of Military Justice?*, 7 San Diego L. Rev. 55 (1970) 19–20

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 98

ISIAH RELFORD, PETITIONER

v.

COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS, FORT LEAVENWORTH, KANSAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the district court (App. 30–32) is not reported. The opinion of the court of appeals (App. 35–37) is reported at 409 F. 2d 824.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1969. The petition for a writ of certiorari was filed on July 22, 1969, and was granted on February 27, 1970 (App. 39). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The grant of certiorari was "limited to retroactivity and scope of *O'Callahan* v. *Parker*, 395 U.S. 258" (App. 39). Accordingly, the questions presented are:

1. Whether the rule of *O'Callahan*, that only "service connected" crimes may be tried by court-martial, should be applied retroactively so as to invalidate convictions that became final before the date of that decision.

2. Whether the requisite service-connection exists when a serviceman is charged with kidnapping and rape on a military reservation in the United States where he is stationed.

STATEMENT

After a trial by general court-martial in December 1961, petitioner, then a corporal in the United States Army stationed at Fort Dix, New Jersey, was convicted on charges of kidnapping and raping two women in violation of 10 U.S.C. 920 and 934,[1] the crimes occurring within the boundaries of the military reservation. He was sentenced to be reduced to the lowest enlisted grade, to forfeit all pay and allowances, and to be put to death.[2] The Army Board of Review sustained the conviction but reduced the sentence to confinement at hard labor for thirty years,

[1] The charges of kidnapping were laid under the General Article (10 U.S.C. 934), kidnapping being one of the crimes not specifically mentioned in the Uniform Code of Military Justice.

[2] The death penalty is authorized by the Code for the crime of rape. See 10 U.S.C. 920(a).

the forfeitur honorable discharge. The Court
of Military enied a petition for review in
September 1 S.C.M.A. 687.

Four yea in October 1967, petitioner
brought a p habeas corpus in the United
States Dist for the District of Kansas,
alleging va in his conviction, including
lack of effe entation by counsel. The dis-
trict court e merits of petitioner's con-
tentions, a petition with a memorandum
opinion (The court of appeals af-
firmed on (App. 35–37; 409 F. 2d 824).
The petiti of certiorari sought to raise
the assist point in this Court, and also
challenge wy of the court-martial con-
viction ment of ts decision, after the judg-
supra; cals, in *O'Callahan* v. *Parker*,
O'Callah anted with respect to the

The ev

tember 4 at on the evening of Sep-
in New Futyma, who was on leave
bell, Ke rmy station at Fort Camp-
Fort Di Valson Army Hospital at
birth to re his wife had just given
old siste th him his fourteen year
and pa rrived at about 10:00 p.m.
Futym l parking lot. Specialist
only a pital, saying he would be
the ca semary remained alone in

[3] Petirned at about 10:20 p.m.

le on May 20, 1970.

Rosemary was not there (R. 28–30, 41).[4] Rosemary testified that, after her brother went inside, petitioner, in civilian clothing, appeared at the passenger side of the car, an open convertible. Brandishing a knife, he got in and told her to drive down the road. When Rosemary was unable to start the car, petitioner forced her to get out and walk down the road with him, placing his arm tightly around her neck. They walked behind some cottages, across a field and into a wooded area, where petitioner pushed Rosemary to the ground and forcibly raped her. Afterwards he left. Rosemary put on her clothes and ran to a house that had lights on, where she told the occupants that she had been raped. They called the military police, who took her back to Walson Hospital (R. 40–45, 47–50, 55–56; see App. 3–5).

With respect to the second kidnapping and rape, Mrs. Jackson, the wife of a member of the Air Force stationed at McGuire Air Force Base (adjacent to Fort Dix), testified that on the evening of October 21, 1961, she was driving alone from her home on the Base to the PX concession, also on the Base, where she worked as a waitress. When she halted at a stop sign, petitioner, in civilian dress, entered the car from the passenger side, put a knife to her throat, and said: "Be quiet and I won't hurt you". Petitioner directed her to drive to a dirt road in a training area on Fort Dix. There he forced Mrs. Jackson to remove her clothes and raped her (R. 68–73, 75–77, 81, 115; see App. 5–13). Subsequently, peti-

[4] "R." refers to the record of the court-martial proceedings, a copy of which is on file with the Clerk.

tioner directed Mrs. Jackson to drive to another part of Fort Dix; there, they happened upon a military police vehicle, and Mrs. Jackson managed to report the crime to the policemen. Petitioner was arrested and taken to the military police station where, after brief interrogation that evening and the next morning, he confessed to both crimes (R. 78–80, 101, 108, 110, 119–129, 132–133; see App. 13–17).

It is undisputed that at the time of these crimes petitioner Relford was stationed at Fort Dix and that all of the events involved took place on the military reservation encompassing Fort Dix and the contiguous McGuire Air Force Base.

ARGUMENT

INTRODUCTION AND SUMMARY

The radical change in the foundations of military justice announced at the end of the 1968 Term in *O'Callahan* v. *Parker* has, as the dissent predicted, presented difficult problems of defining concretely what offenses by servicemen may constitutionally be punished by court-martial under the "service connection" test established but not elaborated by this Court. The Court of Military Appeals has already decided a substantial body of cases involving the application of *O'Callahan,* and there have been several decisions in the lower federal courts. Through these decisions, we believe that a workable definition of some of the elements of the service-connection is slowly emerging. This case offers this Court an opportunity to consider these definitional problems, and also to answer the nagging question—of enormous practical import—

405-530—70——2

whether the government is justified in its belief that *O'Callahan* cannot be used to reopen, on habeas corpus or more often in back-pay and similar collateral suits, the vast multitude of court-martial convictions based upon the principles of military jurisdiction prevailing before *O'Callahan.*

While it is evident that a decision in the government's favor on either of the two questions presented in this case would eliminate any technical necessity to decide the other, we urge the Court to decide both in the interest of the clarification that is urgently needed. We shall follow the pattern of petitioner's brief in discussing the question of scope first, but this is not to suggest that the retroactivity question is of any less importance.

At the outset, it may be helpful to outline the principles that are emerging from the decisions of the Court of Military Appeals and, to a lesser extent to date, the lower federal courts. Both the Court of Military Appeals and the several federal courts that have considered the question have agreed upon the principle that the *O'Callahan* rule does not apply to court-martial convictions that became final (by completion of review within the military system) before the date of that decision, June 2, 1969.[5] The Court of Military appeals has held that petty offenses do not fall within the scope of *O'Callahan,* since such offenses have tra-

[5] *E.g.*, *Mercer* v. *Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264; *Thompson* v. *Parker*, 308 F. Supp. 904 (M.D. Pa.), appeal dismissed, C.A. 3, No. 18,868, April 24, 1970; *Gosa* v. *Mayden*, 305 F. Supp. 1186 (N.D. Fla.); *Schloman* v. *Moseley*, D. Kans. No. L–1003, May 19, 1970.

ditionally not carried with them the Fifth Amendment rights underlying *O'Callahan*.[6] Both the Court of Military Appeals and the Court of Claims, as well as a number of district courts, have held that an off-duty, off-post crime committed overseas may be punished by court-martial;[7] last term, this Court denied certiorari in a case raising that question, *Swift* v. *Commandant*, 396 U.S. 1028, and it is raised again in the petition for a writ of certiorari in *Gallagher* v. *United States*, No. 392, this Term, in opposition to which we have stated the government's views as to overseas court-martial jurisdiction.

With respect to serious crimes committed within the United States—the general problem posed by the instant case—there have been few cases not involving the retroactivity question that have yet reached the lower federal courts; the only cases of which we are aware have applied a multi-factor approach that does not permit the statement of rules of thumb.[8] The Court of Military Appeals, which in the nature of things has had a greater volume of cases, appears to

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[6] *United States* v. *Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26.

[7] *E.g.*, *United States* v. *Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64; *Gallagher* v. *United States*, 423 F. 2d 1371 (Ct.Cl.); *Bell* v. *Clark*, 308 F. Supp. 384 (E. D. Va.).

[8] In *Silvero* v. *Chief of Naval Air Basic Training et al.*, C.A. 5, No. 28,419, decided July 13, 1970, the offense of sodomy committed off post by a naval officer on non-commissioned seamen was held to be triable by court-martial. In *Diorio* v. *McBride*, C.A. 5, No. 28,961, September 10, 1970, the same court held that use and possession of marihuana on post by an off-duty military policeman was subject to court-martial. In *Moylan* v. *Laird*, 305 F. Supp. 551 (D. R.I.), off-post possession of marihuana was held not service-connected.

have developed the rule that crimes committed by servicemen on post are, without more, sufficiently service-connected to justify court-martial;[9] as to off-post crimes, that court has considered a number of factors, case by case, including the military status of the victim and the role the offender's military status played in the crime.[10]

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[9] See, *e.g.*, *United States* v. *Crapo*, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (assault and robbery of civilian taxi driver); *United States* v. *Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (sodomy in on-base housing); *United States* v. *Smith*, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (carnal knowledge in on-base housing); *United States* v. *Allen*, 19 U.S.C.M.A. 31, 41 C.M.R. 31 (murder), *United States* v. *Paxiao*, 18 U.S.C.M.A. 608, 40 C.M.R. 320 (wrongful appropriation of civilian-owned truck parked on base); *United States* v. *Hallahan*, 19 U.S.C.M.A. 46, 41 C.M.R. 46 (cashing of forged check in bank located on post).

[10] Thus, while finding a lack of service connection as to some off-base crimes, *e.g.*, *United States* v. *Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (carnal knowledge of female under sixteen years in accused's apartment very near but outside base gate), *United States* v. *Borys*, 18 U.S.M.A. 547, 40 C.M.R. 259 (rape, robbery, and sodomy), the Court of Military Appeals has held that where the offense is committed against another serviceman, military jurisdiction under *O'Callahan* exists. *United States* v. *Nichols*, 19 U.S.C.M.A. 43, 41 C.M.R. 43, *United States* v. *Everson*, 19 U.S.C.M.A. 70, 41 C.M.R. 70. The Court has also decided in favor of military jurisdiction where it has concluded that the accused used his military status in order to facilitate commission of the offense. *E.g.*, *United States* v. *Peterson*, 19 U.S.C.M.A. 319, 41 C.M.R. 319; *United States* v. *Peak*, 19 U.S.C.M.A. 19, 41 C.M.R. 19. In *United States* v. *Beeker*, 18 U.S.C.M.A. 563, 40 C.M.R. 275, the court held that crimes involving the use, possession or delivery of marijuana or prohibited drugs on or off base were automatically "service connected" because of the "disastrous effects * * * on the health, morale and fitness for duty" of members of the armed forces of such crimes. In contrast, the Court of Military Appeals has

This case does not, of course, call upon this Court to consider the propriety of all of the judgments that have been made by the Court of Military Appeals and the lower federal courts in determining, case by case, what constitutes a sufficient service-connection in the many factual situations that have already arisen. Still less does it permit of the establishment of general rules that will govern all future cases; one of the serious practical problems created by the *O'Callahan* decision is the difficulty of formulating reasonably definite rules for the guidance of the many military commanders in various locations and the military judges before whom court-martials are tried in determining—as they must many hundreds of times every year [11]—whether particular servicemen should be court-martialed for particular offenses. This case does, however, permit the Court to consider the scope of *O'Callahan* in the concrete context of on-base crimes and also, we hope, to illuminate to some extent the kind of approach that can permissibly be taken to the complex general problem of definition.

The crimes involved in the instant case differ sharply from that found non-service-connected in *O'Callahan*. There, the crime took place in the civilian community away from the offender's post and the vic-

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held that jurisdiction over off-post crimes cannot be founded solely upon the dependent status of a victim. *United States* v. *Henderson*, *supra*; *United States* v. *McGonical*, 19 U.S.C.M.A. 94, 41 C.M.R. 94.

[11] The Army has estimated that in a recent year it alone conducted about 25,000 court-martials for offenses that might be argued to be non-service-connected, of which some 750 involved serious crimes.

tim had no military connection. Here, on the other hand, the crimes took place on the military reservation where petitioner was stationed (and both victims did have military ties—one as the wife of a serviceman, residing on the reservation and employed there, the other the sister of a serviceman). We urge that any crime by a serviceman jeopardizing the security of persons and property on his military installation is per se service connected, because of its elementary impact on the military mission; the more subtle weighing of the various other factors (which we outline in a preliminary way) pertinent to a determination of the service-connection of off-post crimes or non-physical crimes on post is accordingly not necessary to decide this case. Such a rule is implicit in the *O'Callahan* opinion itself and the history it relies on; it comports with the decisions of the Court of Military Appeals and the lower federal courts as well as the views of most commentators. Petitioner's suggestion that the court-martial power should extend only to situations where the offender has violated a uniquely military standard of behavior is inconsistent with the reasoning of *O'Callahan;* the constitutional authority for the "Government and Regulation of the land and naval Forces" surely encompasses more than simply the authority to arrest a member of the forces who jeopardizes the safety and security of his post and turn him over to civilian authorities (who have little natural interest in the problem) for prosecution; it must include the power to punish such a crime.

In any event, petitioner's conviction long preceded the date of the *O'Callahan* decision, and should not be

affected by it. The revolution in military justice occasioned by *O'Callahan* should not be made retroactive to upset countless court-martial convictions that have been rendered over many years under the mandate of Congress. The principles that this Court enunciated in *Stovall* v. *Denno,* 388 U.S. 293, 297, and has followed in numerous cases call for prospective application of *O'Callahan* for reasons closely similar to those that led to the decision in *DeStefano* v. *Woods,* 392 U.S. 631, that the imposition of jury trial requirements upon the States should not be retroactive. In terms of the first *Stovall* criterion—the purpose of the new rule—it cannot be said that courts-martial are inherently so unfair that no past conviction for a non-service-connected crime can stand; we point out briefly some of the protections for the accused inherent in the court-martial system. Just as the jury right in question in *DeStefano* did not invalidate past non-jury trials, so also the jury (and grand jury) rights that underlie the *O'Callahan* decision do not invalidate past court-martial trials. Moreover, the other two *Stovall* factors—reliance by the military upon the law as it was before *O'Callahan* and the practical impact that retroactivity would have—are unusually strong in the present context. Court-martials for non-service-connected crimes (as that term is used in *O'Callahan*) have gone on for many years with strong support from a previously unbroken line of decisions in this Court and with the express authorization of decisions in the lower federal courts.

Retroactively overturning these convictions would not only free hundreds of those properly imprisoned

under the law at the time of their convictions, but would also result in voluminous civil litigation for correction of military records, back pay and the like. In many such cases it would be extremely difficult, if not impossible, to reconstruct all of the facts from which service connection could be determined, to say nothing of the problems of marshalling the evidence that would be required for retrials in civilian courts. Thus here, as in *DeStefano,* the practical considerations require prospectivity and the purpose of the new rule permits it, as the Court of Military Appeals and lower federal courts have held. Nor does the shibboleth that *O'Callahan* is "jurisdictional" warrant automatic retroactivity; here, as in other retroactivity cases the question is whether a new trial right should be applied to old trials and analysis can proceed intelligently only by considering the criteria that have governed those cases. Accordingly, the rule adopted by the Court of Military Appeals—that no conviction that had become final by the exhaustion of military review procedures before June 2, 1969, will be disturbed under *O'Callahan*—is constitutionally permissible and should be followed.

I. AN OFFENSE BY A SERVICEMAN THAT DIRECTLY JEOPARDIZES THE PHYSICAL SECURITY OF A MILITARY BASE IS "SERVICE CONNECTED"

This Court held that Sergeant O'Callahan could not constitutionally be court-martialed for his off-duty, off-post attack upon a civilian girl because "[t]here was no connection—not even the remotest one—be-

tween his military duties and the crimes in question"; the Court's opinion pointed out, among other things (395 U.S. at 273–274), that O'Callahan

> * * * was properly absent from his military base when he committed the crimes with which he is charged. * * * *The crimes were not committed on a military post or enclave;* nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.
>
> Finally, we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country. The offenses did not involve any question of the flouting of military authority, *the security of a military post,* or the integrity of military property. [Emphasis added; footnote omitted.]

This case, however, is very different from *O'Callahan.* Petitioner's offenses—kidnapping and raping two women on the military reservation where he was stationed—did involve "the security of a military post" directly. We submit that any such crime affecting the physical safety of persons and property on a military base is per se service-connected, whatever the outer limits of service-connection may be.

Such a rule is suggested not only by implication from this Court's language in *O'Callahan* but also by the history to which the opinion refers. In discussing the "general article" which in the early years (be-

ginning in 1775) was the basis for court-martial jurisdiction over crimes not military in the narrow sense, Winthrop's standard treatise on military law stated:

> A crime, therefore, to be cognizable by a court-martial under this Article, must have been committed under such circumstances as to have directly offended against the government and discipline of the military state. Thus such crimes as theft from or robbery of an officer, soldier, post trader, or camp-follower; forgery of the name of an officer, and manslaughter, assault with intent to kill, mayhem, or battery, committed upon a military person; inasmuch as they directly affect military relations and prejudice military discipline, may properly be—as they frequently have been—the subject of charges under the present Article. On the other hand, where such crimes are committed upon or against *civilians,* and not at or near a military camp or post, or in breach or violation of a military duty or order, they are not in general to be regarded as within the description of the Article, but are to be treated as civil rather than military offenses.

Winthrop, *Military Law and Precedents* (1920 War Department Reprint) 1124–1125. The *O'Callahan* opinion quotes this passage with apparent approval (395 U.S. at 274, n. 19; see also *id.* at 278–279 (Harlan, J., dissenting)).

Even on the narrowest view, we submit, there is a plainly identifiable military interest in the security of persons having business on a military post from physical attack by servicemen on that post; there is a similar strong interest in the protection of property

on the post. The commander of a military installation clearly has the responsibility and authority to maintain law and order in his command. Army Regulation 210–10(13); see *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886; *United States* v. *Jelinski*, 411 F. 2d 476 (C.A. 5), certiorari denied, 396 U.S. 943; *Weissman* v. *United States*, 387 F. 2d 271 (C.A. 10). It follows that the military—through its court-martial procedures—must be able to punish behavior by a serviceman that disrupts the physical security of the military environment in which he works and lives and thus tends to jeopardize the ability of the command to carry out its military mission. That mission necessarily goes on around the clock, and there is no basis on which a post can be rationally segregated into military and non-military areas for law-enforcement purposes; obviously, the military mission is seriously hampered unless commanders can assure that persons can move freely and safely about military installations at any hour, and can assure that all property on the post is secure. Nor is there any significance in this context to the question whether the offender is technically on duty or not; so long as he is in military service and remains on post, he necessarily remains subject to such elementary regulation by his commander.

We note further that the facts of this case involve an additional factor properly of concern to the military. One of petitioner's victims (Mrs. Jackson) was the wife of a serviceman also stationed on the military reservation, and she both lived and herself

worked on the reservation; the other (Miss Futyma) was the sister of a serviceman who had business on the post arising out of his military status. While we agree with the Court of Military Appeals that the dependent status of a victim is not necessarily enough by itself to establish court-martial jurisdiction, it is obviously a significant factor. See Nelson and Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan* v. *Parker,* 54 Minn. L. Rev. 1, 30 (1969) (hereafter Nelson and Westbrook). The morale and hence effectiveness of the military establishment is clearly impaired if the military cannot assure the personal security of its members' families on military property. While this factor underlines the service connection in this particular case, we do not think that it should be necessary to rely upon it. Rather, in the interest of establishing rules that are as clear and easy of application as possible, we urge the Court to hold that the fact that a crime against person or property took place on a military reservation is alone enough to warrant court-martial of the offending serviceman.

Petitioner's brief suggests that court-martial jurisdiction should exist only when a serviceman has violated a rule of conduct that establishes a uniquely military standard; in other words, he appears to suggest that the Constitution forbids the military to punish any behavior that also violates civilian law. This suggestion misconceives the Court's clear holding in *O'Callahan* and would render much of the reason-

ing there superfluous. There would have been no need for the Court in *O'Callahan* to spell out the various factors to show no service connection (including the off-base location of the offenses and the fact that victim there was performing no duties relating to the military) if it had been enough to note that O'Callahan's crimes were (like those here) not purely military but of a kind punishable traditionally by the common law. The need to maintain discipline and morale, particularly with respect to often isolated communities and bases administered by military authority, requires more in the way of court-martial jurisdiction than the ability to prosecute only those violations of the military code enacted by Congress that arise solely from the offender's military status. The test laid down by this Court in *O'Callahan,* we submit, recognizes this need.

It is not enough to say, as petitioner does (Brief, p. 10) that the military interest in a serviceman's on-post crimes can be vindicated by turning the offender over to a state or federal court for prosecution.[12] In the first place, it is not clear to us why, as a matter of allocation of governmental responsibility, a local court and jury should be expected to vindicate the military's disciplinary problems with its own personnel in its own community. More fundamentally, a natural reading of the constitutional mandate for the "Government and Regulation of the land and naval

[12] Because of the different status of different parcels of real estate used for military bases, state law would apply in some and federal law in others, with differences in some cases among areas of the same post.

Forces" surely connotes more than a limited military authority to hold a serviceman guilty of a crime against person or property on his own post for prosecution by civilian authorities; "Government" and "Regulation" necessarily carry with them the power to punish and not simply the power to arrest and accuse.

As we have noted, the Court of Military Appeals has apparently developed a general principle that any crime actually committed by a serviceman on post is triable by court-martial; specifically, that court has endorsed court-martials for cashing forged checks at on-post facilities. See p. 8, *supra*. While under all the circumstances, adequate service connection may well exist in such cases, the per se principle we advocate as the basis for deciding the scope question in this case need not go so far. Rather, we would define the governing principle here as covering crimes against the person or against tangible property—crimes which directly implicate the physical security of the post. Thus petitioner errs in asserting (Brief, pp. 10–11) that for the Court to place conclusive weight on the on-base location of *his* offenses necessarily means that the Court would be lending its imprimatur to the exercise of court-martial jurisdiction over a tax fraud prosecution where "a serviceman executed his tax return in on-post housing rather than in the nearby community." Whether or not the rationale of the Court of Military Appeals' bad-check decisions would include the tax-evasion spectre, that issue need not be reached here.

In our view, cases involving tax evasion and other kinds of offenses that may originate on post, as well as

cases involving off-post civil-type crimes within the United States, will have to be decided by the consideration of a number of factors that may or may not converge in a particular case. Among these factors are the following: the status of the victim (military, dependant or otherwise) and perhaps that of any partners in crime; whether the offender was on duty at the time of the crime; whether the offender was in uniform or his military status was in some way especially pertinent to the crime or facilitated it; whether the offense had some special characteristic tending to cast discredit upon the military; whether there is some special military need for retaining custody of the accused (*e.g.*, a port offense by a member of a ship's crew); whether the offense occurred in peacetime or wartime. This enumeration of factors is not necessarily either exhaustive or precise; it may be hoped that as future cases accumulate broader rules of thumb will evolve for the guidance of courts and commanders, but this case does not appear to require or permit such a broad set of guidelines.[13]

We note that the lower federal courts that have been confronted with *O'Callahan* problems have decided them in terms of factors such as those we have suggested, and that the Court of Military Appeals has approached the off-post cases in a similar manner. See pp. 7–9, *supra*. And the suggestions of the commentators are generally consistent with the approach we take here. See, *e.g.*, Comment, *O'Callahan* v. *Parker:*

[13] It is further the government's position that crimes committed overseas and petty offenses may be tried by court-martial and that an accused may waive his right to a civilian trial.

Sounding the Death Knell of Military Justice?, 7 San Diego L. Rev. 55, 69–71 (1970); Comment, *O'Callahan* v. *Parker, A Military Jurisdictional Dilemma*, 22 Baylor L. Rev. 64, 71–72 (1970). In perhaps the most thoughtful and comprehensive article on *O'Callahan* to be written to date, Nelson and Westbrook offer a set of relevant factors similar to those we have suggested, concluding that some of the factors enumerated "are entitled to greater weight than others and that the importance of a factor may vary according to the offense * * *." 54 Minn. L. Rev. at 32. As an example, they state: [C]ourt martial jurisdiction should exist over most offenses committed on a military reservation. Even if an off duty serviceman murders a civilian who happens to be traveling through the post, the necessity of maintaining the peace and order of the post is enough to sustain jurisdiction." *Ibid.* That is the government's position in this case, and we urge the Court to adopt it as as one clear rule that may somewhat ease the practical burden of applying *O'Callahan*.

II. THE LIMITATIONS UPON THE COURT-MARTIAL POWER NEWLY ESTABLISHED IN O'CALLAHAN V. PARKER SHOULD NOT BE APPLIED RETROACTIVELY TO UPSET CONVICTIONS THAT BECAME FINAL BEFORE THE DATE OF THAT DECISION

In *O'Callahan*, this Court held for the first time that the exception to the Fifth Amendment guarantee of indictment and trial by jury for "cases arising in the land or naval forces" refers only to those cases involving "service connected" offenses and not, as it had

been generally believed, to all offenses by members of the armed forces. In so holding, the Court made unconstitutional in part the express statutory provisions of the Uniform Code of Military Justice making acts not necessarily service-connected punishable by court-martial. Those provisions of the Code have direct statutory antecedents going back to 1916 and, through the general article, back to the beginning of the Republic (see our Brief in *O'Callahan* at pp. 11–16, 20–24). Thus, in practical terms, *O'Callahan* has required a broad scale revamping of the processes of military justice. We submit that this change in basic court-martial law should be treated as prospective only, and should not be the basis for upsetting countless court-martial convictions that became final prior to June 2, 1969, when *O'Callahan* was decided. Specifically, petitioners' conviction, which was rendered in 1961 and became final when the Court of Military Appeals denied review in 1963, should stand even if his crimes be deemed non-service-connected.

At the outset, we point out that the position we urge on retroactivity has been reached by the Court of Military Appeals, in its comprehensive and careful opinion in *Mercer* v. *Dillon,* 19 U.S.C.M.A. 264, 41 C.M.R. 264, by the lower federal courts where the question has arisen (see p. 6, n. 5, supra) and by most of the commentators, *e.g.* Nelson and Westbrook, 54 Minn. L. Rev., at 39–46; Note, *Court-Martial Jurisdiction Limited to "Service-Connected" Cases,* 44 Tulane L. Rev. 417, 423–424 (1970).

In *Stovall* v. *Denno,* 388 U.S. 293, 297, this Court stated the considerations that affect the judgment

whether particular cases creating new constitutional principles of criminal law should be applied only prospectively:

> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. * * *

These considerations require non-retroactive application of the *O'Callahan* rule for reasons quite similar to those underlying the determination in *DeStefano* v. *Woods,* 392 U.S. 631, applying these standards, that the jury trial requirements imposed upon the States by *Duncan* v. *Louisiana,* 391 U.S. 145, and *Bloom* v. *Illinois,* 391 U.S. 194, should be prospective only. In *DeStefano,* the Court evaluated the first criterion, the purpose of the new rule, as follows in the jury trial context (392 U.S. at 633–634):

> *Duncan* held that the States must respect the right to jury trial because in the context of the institutions and practices by which we adopt and apply our criminal laws, the right to jury trial generally tends to prevent arbitrariness and repression. As we stated in *Duncan,* "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never by as fairly treated by a judge as he would be by a jury." 391 U.S., at 158. The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial. * * *

Similarly, we submit, the Court's basic concern in *O'Callahan* to give servicemen who commit non-service connected crimes the right to jury trial in a civilian court is not to be taken as resting upon a determination that all court-martial convictions are inherently unfair. See *Gosa* v. *Mayden, supra,* 305 F. Supp. at 1187; *Thompson* v. *Parker, supra,* 308 F. Supp. at 908; Nelson and Westbrook, *supra,* 54 Minn. L. Rev. at 42–43. The "constitutional stakes" (*O'Callahan,* 395 U.S. at 262) in this case are essentially the same as in *DeStefano*—the right to jury trial [14]—and the purpose element as well as the reliance and effect factors to be discussed *infra,* militate in favor of the same result.

Following the same line of analysis, the Court of Military Appeals in *Mercer* v. *Dillon, supra,* observed that evaluation of the consistency of non-retroactive with *O'Callahan's* purpose did not call for it to "reargue the merits of that decision by emphasizing the extensive statutory and judicial protections an accused in the armed forces enjoys." It did, however, consider it pertinent to point out, *inter alia,* that frequently

> the composition of a court-martial is for a member of the armed forces more nearly a jury of his peers than is a civilian panel in a State where the member may be involuntarily stationed.

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[14] *O'Callahan* also speaks of the right to indictment by grand jury. However, this appears to be a less crucial factor since that provision of the Fifth Amendment has never been held binding upon the States. *Gaines* v. *Washington,* 277 U.S. 81, 86; *Hurtado* v. *California,* 110 U.S. 516.

And, with respect to the absence of grand jury indictment, the court observed the unusual protections given a serviceman in the comparable pretrial investigation under 10 U.S.C. 832, where he has a right to counsel, to present exonerating evidence and to cross-examine witnesses. 19 U.S.C.M.A. at 266, 41 C.M.R. at 266. It is not necessary to elaborate further the substantial protections given accused servicemen, which upon analysis dispel any notion that courts-martial are inherently unfair.[15]

The Court of Military Appeals itself, the judges of which are "appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years" (10 U.S.C. 867), has consistently and fairly reviewed court-martial convictions for constitutional and other error and is, like civilian courts, wholly free of the possibilities of command influence that underlie many attacks on military justice. And we point out the availability of review in the federal courts on habeas corpus to determine that the military tribunals have given fair consideration to a convicted serviceman's basic rights. *Burns* v. *Wilson,* 346 U.S. 137; see *United States* v.

[15] See Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A. L. Rev. 1240 (1968): Nelson and Westbrook, *supra*, 54 Minn. L. Rev., at 57–58, quoting *inter alia* from Chief Justice Burger's dissenting opinion in *United States ex rel. Guagliardo* v. *McElroy*, 259 F. 2d 927, 940 n.29 (C.A.D.C.), referring to the "universal recognition of the UCMJ as the most enlightened military code in history and as [one] affording the basic elements of fairness." See also Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 188–189 (1962).

Augenblick 393 U.S. 348; *Gallagher* v. *United States, supra.*

In any event, we believe that the Court of Military Appeals in *Mercer* was correct in going on to hold that *O'Callahan* should not apply retroactively even if the Court cannot say without qualification that no purpose of the new rule would be served by applying it to old convictions.[16] See also Nelson and Westbrook, 54 Minn. L. Rev at 46. This is so because of the unusually strong compulsion of the two other factors—reliance and impact—in the court-martial situation.

Just as the "States undoubtedly relied in good faith upon the past opinions of this Court to the effect that the Sixth Amendment right to jury trial was not applicable to the States" (*DeStefano,* 392 U.S. at 634), so also the military authorities and Congress have relied upon the previously unques-

[16] Although purpose is the "foremost" of the three factors, see *Desist* v. *United States*, 394 U.S. 244, 249, this Court has noted that it has in the past denied retroactivity in areas where the purpose criterion offered little support. Thus in *Desist* (*id.* at 249–250 n.14) the Court referred to:

"*Stovall* v. *Denno*, 388 U.S. 293, 298, where it was conceded that "the *Wade* and *Gilbert* rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence; *Johnson* v. *New Jersey*, 384 U.S. 719, 730, where it was recognized that "*Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation"; and *Tehan* v. *Shott*, 382 U.S. 406, 414, where it was stated that "the 'purpose' of the *Griffin* rule is to be found in the whole complex of values that the privilege against self-incrimination itself represents," including "our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'" Id. at 414–415, n.12."

tioned constitutionality of those provisions of the Uniform Code of Military Justice that provide expressly for court-martial jurisdiction over non-service-connected crimes by servicemen. Even accepting the *O'Callahan* majority's implicit disclaimer that it was overruling any specific prior decisions (395 U.S. at 267; but see Harlan, J., dissenting, at 275),[17] it remains the fact that military authorities have long exercised court-martial jurisdiction over all crimes by servicemen and that there was not the slightest indication in this Court's pre-*O'Callahan* opinions that they were wrong in doing so; those opinions certainly supported a reasonable inference that military status by itself was enough to permit court-martial. See, *e.g.*, *Ex Parte Milligan*, 4 Wall. 2, 123; *Coleman* v. *Tennessee*, 97 U.S. 509; *Smith* v. *Whitney*, 116 U.S. 167, 184–185; *Johnson* v. *Sayre*, 158 U.S. 109, 114; *Grafton* v. *United States*, 206 U.S. 333, 348; *Reid* v. *Covert*, 354 U.S. 1, 22–23; *Kinsella*

[17] Clearly the fact that a decision does not overrule prior precedents does not mandate retroactive application. The Court has stated that the *Stovall* standards apply to "the judgment whether a case *reversing prior doctrines* in the area of the criminal law should be applied only prospectively." *DeStefano* v. *Woods*, 392 U.S. at 633 (emphasis added). Plainly, a reversal of "prior doctrines" may occur (as we contend it did here) irrespective of whether any specific case was overruled. In *Mordecai* v. *United States*, C.A.D.C. No. 21,943, decided October 7, 1969, certiorari denied, 397 U.S. 977, the court declined to give retroactive effect to this Court's decision in *Kent* v. *United States*, holding that a juvenile facing waiver was entitled to a hearing and the assistance of counsel, notwithstanding that *Kent* had not purported to overrule any previous decisions of this Court. See also this Court's decision in *Johnson* v. *New Jersey*, 384 U.S. 719.

v. *Singleton*, 361 U.S. 234, 240–243; see also our brief in *O'Callahan* at 8–16, 20–25; opinion of Harlan, J., dissenting, 395 U.S. at 278–280.

The lower federal courts that had squarely faced the *O'Callahan* contention had uniformly rejected it. *E.g.*, *Burns* v. *Taylor*, 274 F. 2d 141 (C.A. 10), certiorari denied, 364 U.S. 837; *Owens* v. *Markley*, 289 F. 2d 751 (C.A. 7); *Wright* v. *Markley*, 351 F. 2d 592 (C.A. 7); *Thompson* v. *Willingham*, 318 F 2d 657 (C.A. 3); *O'Callahan* v. *Chief United States Marshal*, 293 F. Supp. 441 (D. Mass.).[18] Beyond doubt, as the court indicated in *Mercer* v. *Dillon*, 19 U.S.C.M.A. 264, 266–267, 41 C.M.R. 264, 266–267:

> The result in *O'Callahan* had not been foreshadowed in other opinions. Before *O'Callahan* the armed forces had absolutely no hint that such considerations as the nature, time, and place of the offense might limit trials by court-martial. * * *

See also Nelson and Westbrook, 54 Minn. L. Rev. at 24, 43. Certainly, when petitioner was court-martialed

[18] As petitioner notes (Pet. Br., p. 18), the sole portent of the result reached in *O'Callahan* was an article published in 1960 (Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Vand. L. Rev. 435), and the authors there based their view on a theory of the "necessary and proper" clause of the Constitution which this Court had rejected in *Reid* v. *Covert*, 354 U.S. 1, and which *O'Callahan* did not purport to revive. The thrust of the article was that the necessary and proper clause was a substantive provision limiting the grant of power to Congress in Article I, Section 8, Clause 14 of the Constitution to "make Rules for the Government and Regulation of the land and naval forces", and that only such civilian offenses as had a military connection could appropriately be deemed "necessary and proper" to court-martial jurisdiction.

in 1961 and the military review process ended in 1963 neither the military officials nor the Court of Military Appeals had reason to think that on post crimes such as petitioner's were not subject to military punishment.

Finally, it is manifest that a retroactive application of *O'Callahan* would have a gravely disruptive "effect on the administration of justice" (the third *Stovall* factor). When the ruling in *O'Callahan* was rendered, the Army Judge Advocate General stated that since 1951 (following passage of the Uniform Code of Military Justice) the Army alone had court-martialed approximately 1.3 million men and estimated that there were 450,000 courts-martial which might be invalid under *O'Callahan*. He further stated that approximately 4000 men in the combined services were in prison at that time but that lawsuits would not be limited to those in prison because presumably actions would be filed relating to other punishments and involving back pay, veterans' benefits and other collateral matters. See Nelson and Westbrook, 54 Minn. L. Rev., at 39–40; see also *Gallagher* v. *United States*, 423 F. 2d 1371 (Ct. Cl.). The Court of Military Appeals observed in *Mercer* v. *Dillon*, 19 U.S.C. M.A. 264, 268, 41 C.M.R. 264, 268:

> For the one fiscal year of 1968, the Army, the Navy, and the Air Force conducted approximately 74,000 special and general courts-martial. If only the smallest fraction of these courts-martial and those conducted in the other years since 1916 involved an *O'Callahan* issue,

> it is an understatement that thousands of courts-martial would still be subject to review. The range of relief could be extensive, involving such actions as determinations by the military departments of whether the character of discharges must be changed, and consideration of retroactive entitlement to pay, retired pay, pensions, compensation, and other veterans' benefits. * * *

Thus the effect on the military and federal judiciary of a holding of full retroactivity of *O'Callahan* would be staggering in terms of the sheer number of cases it would spawn.

Nor is the volume of retroactive *O'Callahan* claims that would be made the only problem. There are likely to be numerous instances in which the elements of service-connection cannot be determined from a stale record or even from a *de novo* hearing, since a number of the factors pertinent to this special inquiry (see p. 19, supra) may not appear in a normal trial record. The magnitude of this problem is seen when it is considered that discharge-correction and back-pay suits may be brought long after any sentence has been completed. Moreover, especially in the more serious cases (involving longer sentences), the lapse of time may be such that retrial in a civilian court is not practicable. Nelson and Westbrook note "the rapid turnover in military personnel and the fact that military people are transferred frequently renders the gathering of witnesses and evidence even more difficult than the already formidable task faced in this regard by civil courts." 54 Minn. L. Rev. at 44.

In *DeStefano* the Court attached great weight to the fact that (392 U.S. at 634):

> the effect of a holding of general retroactivity on law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great number of cases in those States not until now accepting the Sixth Amendment guarantee.

Precisely the same kind of problem is presented for both military and civilian authorities by the prospect that thousands of past court-martial convictions would be upset by retroactive application of *O'Callahan*. Consequently, the Court should give the new doctrine of *O'Callahan* v. *Parker* only prospective effect.[19]

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[19] Petitioner apparently contends that this Court has already resolved the retroactivity issue by according relief to O'Callahan himself in a case on collateral attack (Pet. Br. 13–15). The argument, however, is neither novel nor sound. As the Court stated in *Desist* v. *United States*, 394 U.S. 244, 254–255, n. 24, in rejecting a similar contention as to the retroactivity of *Katz* v. *United States*, 389 U.S. 347:

"Of course, Katz himself benefited from the new principle announced on that date, and * * * to that extent the decision has not technically been given wholly prospective application. But, as we recently explained in *Stovall* v. *Denno*, 388 U.S. 293, 301, the fact that the parties involved in the decision are the only litigants so situated who receive the benefit of the new rule is 'an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum.' Whatever inequity may arguably result from applying the new rule to those 'chance beneficiaries' is 'an insignificant cost for adherence to sound principles of decision-making.'" *Ibid.*

The fact that O'Callahan's conviction was reversed as a result of the *O'Callahan* holding, therefore, has no impact on the issue whether that decision is to be applied with general retroactive effect.

There is in petitioner's brief some suggestion of an argument that *O'Callahan* is a "jurisdictional" decision and ipso facto must be retroactive because "the judgment of a court without jurisdiction is an absolute nullity" (Petitioner's Brief, p. 16). Any such conceptual approach amounts, however, to mere playing with words and ignores both the rationale of *O'Callahan* and the realistic issue in this case. To be sure, the *O'Callahan* opinion uses the term "court-martial jurisdiction" here and there, and we have used the same term from time to time in this brief as a short-hand expression. But the real basis of *O'Callahan* was, as we have stated, the conclusion of a majority of this Court that, under circumstances not amounting to service-connection, the normal court-martial jurisdiction over servicemen cannot be exercised so as to take away their Fifth Amendment rights to indictment and trial by jury. The fact that the effect is to require that certain charges be tried in civilian rather than military courts makes the issue no more "jurisdictional" in any magical sense than did the fact that *Duncan* v. *Louisiana, supra,* required States to try certain kinds of crimes in courts with juries rather than other courts. The issue is simply—as in many of the other retroactivity cases—whether a new trial right should be given to those already tried; as we have indicated, this issue is to be resolved by application of the same criteria that governed those cases.[20] And

[20] Petitioner also points to the fact that this Court's decisions denying the armed services any power to court-martial persons not having military status have been applied retroactively (Petitioner's Brief, p. 14). In the first place, the retroactivity

even in cases that are jurisdictional in a more conventional sense, the courts have properly rejected arguments that retroactivity must inexorably follow. *McSparran* v. *Weist,* 402 F. 2d 867 (C.A. 3), certiorari denied, 395 U.S. 903; *Lester* v. *McFaddon,* 415 F. 2d 1101 (C.A. 4).

There remains, finally, the matter of where the cutoff point lies, if we are correct in our position that *O'Callahan* should be prospective only. As a constitutional matter, we would urge that *O'Callahan* should apply only to cases where the actual court-martial trial began after the decision date, June 2, 1969, making no distinction between cases pending on appellate review and those where the appellate processes had been exhausted. Such a rule would be consistent with this Court's recent retroactivity opinions, which have consistently rejected any such distinction as philosophically untenable, opting in favor of either full retroactivity or full prospectivity. *Desist* v. *United States,* 394 U.S. 244, 252–253; *DeStefano* v. *Woods,* 392 U.S. 631, 635, n. 2; *Stovall* v. *Denno,* 388 U.S. 292, 300–301. See our brief in *Williams* v. *United States,* No. 81, this Term. The Court of Military Appeals has, however, taken a different approach, applying *O'Callahan* to cases that were still subject to appellate review within the military system on June 2, 1969. *E.g., United States* v. *Borys,* 18 U.S.C.M.A. 547, 40 C.M.R.

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question has never been argued in this context. Moreover, the considerations pertinent to a decision that the military may not punish a civilian are quite different from those pertinent to a decision that the undenied power to punish servicemen must be restricted.

259; see *Mercer* v. *Dillon, supra,* 19 US.C.M.A. at 265, 41 C.M.R. at 265. Since the Court of Military Appeals has articulated no constitutional rationale for this limited retroactive application, it must be deemed to be an exercise of its special supervisory power over the administration of military justice, a power that is not subject to review here. Accordingly, it is not necessary for this Court to consider the problem of convictions still in the military appellate process when *O'Callahan* was decided; rather, the question here is only whether the rule established by the Court of Military Appeals—which we believe should also be followed by the civilian courts—is constitutionally permissible. For the reasons we have given, we submit that it is, and that *O'Callahan* should govern only those cases where court-martial convictions have become final since June 2, 1969.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be affirmed.

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